LEONG YING MING

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUANTAN
LAMIN MOHD. YUNUS J
[CRIMINAL APPLICATION NO. 44-1-1990]
2 APRIL 1990

CRIMINAL PROCEDURE: *Offence under s. 39A(2) Dangerous Drugs Act 1952 - Whether offence bailable - Interpretation of s. 41B(1) of the same Act.*

The applicant was charged with the offence under s. 39A(2) of the Dangerous Drugs Act 1952 (Act 234). Bail was applied for before the Sessions Court Judge at Bentong but was refused on the ground that it was an unbailable offence under the Dangerous Drugs Act 1952. This is an application for bail on the ground that the offence under s. 39A(2) falls under s. 41B(1)(c) and not s. 41B(1)(b) of the Act and therefore it is bailable unless the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person. There is no such certificate. The learned Deputy Public Prosecutor opposed the application on the authority of *Yap Sooi Kim v. Public Prosecutor* [1989] 2 CLJ (Rep) 688.

Held:

[1] For an offence under s. 39A(2) of the Dangerous Drugs Act 1952, the Court has the power to punish for any term from five years up to life. As for subsection (1)(a) of s. 41B of the Act it concerns the type of offences for which the Court has the power to impose the sentence of death and for the type of offences under subsection (1)(c) the Court has the power to impose the sentence of imprisonment "for five years or less" or in other words "not exceeding five years". But under subsection (1)(b) it is worded as "more than five years". It is not "five years and more". It is anything beyond five years, whilst under s. 39A(2) the minimum term of imprisonment which the Court has the power to impose is "not less than five years". In other words, it is "five years and more". It does appear that strictly an offence under s. 39A(2) cannot be of the type as stipulated under s. 41B(1)(b).

[2] In the circumstances, bail of RM10,000 in two sureties was allowed.

Case referred to:
Yap Sooi Kim v. Public Prosecutor [1989] 2 CLJ (Rep) 688

Legislation referred to:
Dangerous Drugs Act 1952, ss. 39A(2), 41B(1)(c), (b)

For the applicant - Tan Hock Chuan; M/s. Kam Woon Wah & Co.
For the respondent - Allaudeen bin Ismail, Deputy Public Prosecutor

JUDGMENT

Lamin Mohd. Yunus J:

This is an application for bail by a person charged with the offence under s. 39A(2) of the Dangerous Drugs Act 1952 (Act 234) and the charge reads:

> Bahawa kamu pada 14 September 1989 jam lebih kurang pukul 10.30 malam, di dalam sebuah bilik di kedai No. 86 Jalan Ah Peng, Bentong, dalam Daerah Bentong, dalam Negeri Pahang Darul Makmur, seorang yang tidak di beri kuasa di bawah s.4 dan 5 atau mana-mana juga

undang-undang yang diperbuat di bawah s. 7 Akta Dadah Berbahaya telah di dapati dalam kawalan kamu 106 kartus ganja seberat 50.84 gm, oleh itu kamu telah melakukan satu kesalahan di bawah s. 6 dan boleh di hukum di bawah s. 39A(2)(f) Akta Dadah Berbahaya No. 30/52 (semakin 1980) Akta 234.

Bail was applied for before the Sessions Court Judge at Bentong but was refused on the ground that it was an unbailable offence under the Dangerous Drugs Act 1952. A person found guilty for an offence under s. 39A(2) of the Dangerous Drugs Act 1952 "shall ... be punished with imprisonment for life or for a term which shall not be less than 5 years, and shall also be punished with whipping of not less than ten strokes." The learned Counsel for the applicant submitted that the offence under s. 39A(2) falls under s. 41B(1)(c) and not s. 41B(1)(b) of the Act and therefore it is bailable unless the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person. There is no such certificate in respect of the present case. The learned Deputy Public Prosecutor opposed the application on the authority of *Yap Sooi Kim v. Public Prosecutor* [1989] 2 CLJ (Rep) 688.

The original charge that was preferred against the applicant before the Bentong Magistrate's Court on 15 September 1989 pending the issuance of the chemist report was for an offence under s. 39A(1) of the Act and he was granted bail of RM5,000 in two sureties. Subsequently on 12 February 1990, the said charge was amended to one under s. 39A(2) in the form as produced above. The penalty for the offence under subsection (1) of s. 39A is:

> shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be punished with imprisonment for a term which shall not be less than two years but shall not exceed five years, and he shall also be punished with whipping of not less than three strokes but not more than nine strokes.

and the applicant was allowed bail as it falls under s. 41B(1)(c); hence the bail of RM5,000. Section 41B reads:

> (1) Bail shall not be granted to an accused person charged with an offence under this Act;
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> (a) where the offence is punishable with death; or
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> (b) where the offence is punishable with imprisonment for more than five years; or
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> (c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.
>
> (2) The provisions of subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

The penalty for the offence under s. 39A(2) is:

> shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be punished with imprisonment for life or for a term which shall not be less than five years, and he shall also be punished with whipping of not less than ten strokes.

The minimum imprisonment term under s. 39A(2) is five years. But the category of offence that falls under s. 41B(1)(b) for which no bail will be granted is one that is "punishable with imprisonment for more than five years." Section 39A(2) is an offence carrying the minimum penalty of five years with life imprisonment as the maximum. Under s. 41B(1)(b) the minimum penalty that the Court is empowered to impose is not five years but it is "more than five years". The learned Mr. Justice Annuar in the case of *Yap Sooi Kim v. Public Prosecutor* explains (at p. 45):

With respect, I think the learned Counsel has misread the provision of s. 41B(1)(b) of the Act when he contended that this restriction on bail does not apply if the accused is sentenced to 5 years imprisonment. The operative words under this section are "punishable with imprisonment". This phrase means the power of punishment which the Court has under the law and not the punishment which the Court may choose to impose. As an accused charged with an offence under s. 39A(2) of the Act is liable to an imprisonment term for life (five years being the minimum), it is clear that that is an offence within the ambit of s. 41B(1)(b) of the Act.

With respect it is agreed that the power under s. 41B(1)(b) is the power of punishment which the Court has. So also in the case of the other two paras. (a) and (c) of subsection (1). For an offence under s. 39A(2), the Court has the power to punish for any term from five years up to life. As for subsection (1)(a) of s. 41B it concerns the type of offences for which the Court has the power to impose the sentence of death and for the type of offences under subsection (1)(c) the Court has the power to impose the sentence of imprisonment "for five years or less" or in other words "not exceeding five years." But under subsection (1)(b) it is worded as "more than five years". It is not "five years and more". It is anything beyond five years, whilst under s. 39A(2) the minimum term of imprisonment which the Court has the power to impose is "not less than five years". In other words, it is "five years and more." It does appear that strictly an offence under s. 39A(2) cannot be of the type as stipulated under s. 41B(1)(b). Perhaps it would have been clearer if s. 41B(1)(b) had been worded thus:

(b) Where the offence is punishable with imprisonment for not less than five years.

In the circumstances I therefore allowed bail of RM10,000 in two sureties.

Also found at [1990] 1 CLJ 1156